ONG POH CHENG

v.

PP

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CRIMINAL APPEAL NO: P-05-107 OF 1995]
31 JULY 1998

CRIMINAL PROCEDURE: *Trial - Identification parade - Charge under s. 4 Firearms (Increased Penalties) Act 1971 - Identification of accused - Identity of accused as the robber - Identification parade ruled defective and rejected by trial judge - Whether fatal - Whether still open to court to rely on dock identification of accused - Firearms (Increased Penalties) Act 1971, ss. 3, 4 - Penal Code, s. 308*

EVIDENCE: *Identification evidence - Identity of accused - Identification parade ruled defective and rejected by trial judge - Whether fatal - Whether still open to court to rely on dock identification of accused*

This was an appeal by the appellant against his conviction and sentence in respect of offences under s. 4 of the Firearms (Increased Penalties) Act 1971 and s. 308 of the Penal Code for which he was sentenced to life imprisonment with six strokes of the rotan and to three years' imprisonment respectively. The facts showed that at the trial, the learned judge had made a finding that the identification parade that was held to identify the appellant was seriously defective, and on that score rejected that identification. The learned judge, however, ruled that the identity of the appellant as the robber had been conclusively proved by his identification in court, and by other incriminating evidence, and in the circumstances convicted the appellant after rejecting his defence that he only displayed an imitation gun. The appellant argued in this appeal that the approach of the learned judge in respect of his identification was wrong, and that the learned judge, having rejected his identification at the identification parade, ought to have rejected as well his identification from the dock.

Held:
Per Shaik Daud Ismail JCA

[1] Any identification at an identification parade will tend to strengthen the prosecution's case, but it does not follow that the lack of it will be fatal or will destroy a court or dock identification. It must necessarily depend on the facts and circumstances of each particular case.

[2] In this case, apart from the court identification of the appellant as the robber, there were other overwhelming evidence which positively put the appellant at the scene of the robbery on the day in question. In the light of the overwhelming evidence, the learned judge came to the right conclusions as to the identity of the accused.

[2a] It did not follow, as a matter of course, that just because the learned judge rejected the identification at the identification parade, he must of necessity also reject the dock identification of the appellant. The facts showed that the identification thereof was rejected not because there was no identification of the appellant as the robber, but because there was defect in the conduct of the parade. That being so, his rejection of the evidence at the identification parade was in no way fatal to the dock identification of the appellant as the robber.

[3] The learned judge had ample evidence before him to come to the conclusion as he did on the identity of the robber as the appellant. The learned judge had also rightly rejected the defence of the imitation gun. There was consequently no reason for this court to disturb the findings of the learned judge.

[Appeal dismissed; convictions and sentences confirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan oleh tertuduh terhadap sabitan dan hukuman ke atasnya berhubung kesalahan-kesalahan di bawah s. 4 Akta Senjata (Penalti Lebih Berat) 1971 dan s. 308 Kanun Keseksaan di mana tertuduh dihukum penjara seumur hidup dengan enam sebatan dan penjara tiga tahun masing-masingnya. Fakta menunjukkan bahawa semasa perbicaraan, hakim perbicaraan membuat kesimpulan bahawa perbarisan cam yang diadakan untuk mengecam tertuduh adalah cacat, dan atas alasan itu menolak identifikasi berkenaan. Hakim perbicaraan bagaimanapun memutuskan bahawa identiti perayu sebagai perompak telah dibuktikan dengan konklusif oleh pengecamannya di mahkamah, dan oleh keterangan-keterangan 'incriminating' lain, dan dalam halkeadaan sedemikian mensabit perayu seperti di atas setelah menolak

pembelaan perayu bahawa beliau hanya memperlihatkan pistol tiruan. Perayu berhujah dalam rayuan ini bahawa pendekatan yang diambil oleh hakim perbicaraan berhubung pengenalannya adalah salah, dan bahawa hakim perbicaraan, setelah menolak pengenalannya di perbarisan cam, seharusnya menolak sama pengenalannya semasa kandang.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Sebarang pengenalan di perbarisan cam akan memperkuatkan kes pendakwa, tetapi ianya tidak mengikut bahawa ketiadaanya akan menjadi fatal atau akan memusnahkan pengenalan di mahkamah atau di kandang. Ianya mestilah bergantung kepada fakta dan halkeadaan sesuatu kes.

[2] Dalam kes ini, selain dari pengenalan di mahkamah bahawa perompak tersebut adalah perayu, terdapat limpahan keterangan-keterangan lain yang secara positif menunjukkan perayu berada di tempat kejadian rompakan pada hari berkenaan. Mengambilkira keterangan yang melimpah ini, hakim perbicaraan telah membuat kesimpulan yang betul berhubung identiti tertuduh.

[2a] Ianya tidak mengikut, sebagai satu perkara kebiasaan, bahawa cuma kerana hakim yang bijaksana menolak pengenalan di perbarisan cam, maka beliau seharusnya juga menolak pengenalan perayu di kandang. Fakta menunjukkan bahawa pengenalan yang ditolak itu ditolak bukan disebabkan tidak terdapat identifikasi bahawa perompak tersebut adalah perayu, tetapi kerana terdapat kecacatan dalam cara mengadakan perbarisan. Dengan hal yang demikian, penolakan pengenalan di perbarisan cam oleh hakim tidak memudaratkan pengenalan di kandang bahawa perayu adalah perompak berkenaan.

[3] Hakim yang bijaksana mempunyai banyak keterangan di hadapannya yang membolehkan beliau membuat kesimpulan tentang identiti perompak yang merupakan perayu di sini. Hakim yang bijaksana juga betul bilamana menolak pembelaan bahawa senjata berkenaan hanyalah pistol tiruan. Dengan itu tiada sebab bagi mahkamah ini mengubah dapatan dan rumusan yang dibuat oleh yang arif hakim.

[Rayuan ditolak; sabitan dan hukuman disahkan.]

Cases referred to:
Arumugam Muthusamy v. PP [1998] 3 CLJ 597 ***(dist)***
PP v. Lin Lian Chen [1992] 1 CLJ 2086 ***(refd)***

Legislation referred to:
Firearms (Increased Penalties) Act 1971, ss. 3, 4
Penal Code, s. 308

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the respondent - Shamsul Sulaiman; A-G's Chambers

[Appeal from High Court, Pulau Pinang; Criminal Trial No: 45-11-1993; [1996] 1 CLJ 501]

Reported by Rusnah Abdul Aziz

JUDGMENT

Shaik Daud Ismail JCA:

The appellant Ong Poh Cheng, was originally charged in the High Court at Penang for an offence under s. 3 of the Firearms (Increased Penalties) Act 1971 (the Act) in that he discharged a firearm with intent to cause death or hurt in the course of a robbery, an offence punishable with death upon conviction. The trial proceeded on that basis but at the close of the prosecution's case, the learned judge found that the prosecution had not succeeded in proving the offence as charged but had succeeded in proving a case under s. 4 of the Act in that he exhibited a firearm in a manner likely to put a person in fear of death or hurt in the course of a robbery. The court accordingly amended the charge and was also of the view that there was evidence to establish that the appellant had discharged the firearm at Constable 89541, Mohd. Tahir bin Mohd. Shah and Constable 109196, Mohd. Yusoff bin Ismail with the intention of causing death or such bodily injury likely to cause death to the said Constables an offence punishable under s. 308 of the Penal Code. In the light of this finding, the learned judge added this charge and called upon the appellant to enter his defence on both the amended and additional charges.

At the close of the defence case, the appellant was found guilty on both the charges. For the offence under s. 4 of the Act, he was sentenced to life imprisonment with six strokes of the rotan and for the offence under s. 308 of the Penal Code, he was sentenced to imprisonment for three years to take effect from his date of arrest.

Encik Karpal Singh, learned counsel for the appellant, relied on one main ground of appeal ie, on the issue of the identification of the appellant. He submitted that the learned judge after concluding that the identification of the appellant at an identification parade was defective, erred in accepting the identification of the appellant in court as the robber. He argued that since the identification of the appellant at the identification parade was defective, the learned judge rightfully rejected that identification. He further argued that in the light of the evidence led by the prosecution, the identity of the appellant as the robber had not been conclusively proved.

Encik Shamsul Sulaiman, the learned Deputy Public Prosecutor, conceded that the main issue in this appeal was the identity of the appellant as the robber. However, he submitted that the dock identification of the appellant was not the only evidence that connected him to the crime. In order to appreciate his line of argument, it is pertinent to consider the facts of the case.

At about 3 to 3.15pm on 18 August 1997, Liew Yeow Wah (SP1) the proprietor of Tai Loong Diamond and Jewellery of 90 Pitt Street Penang, testified that he was in the shop and his brother Liew Khim Wan (SP15) was attending to a customer. He saw the appellant parking his motorcycle outside the shop. SP15 in fact opened the door of the shop for the appellant to enter. On entering he was attended to by SP1. He asked and was shown certain gold ornaments, which he inspected and even asked for more ornaments to be shown. After sometime the customers who were being attended to by SP15, left the shop. Immediately thereupon, the appellant whipped out a gun and declared that he was holding up the shop. The appellant emptied two trays of ornaments into a plastic bag and started to walk out of the shop. As he could not open the door, he flashed his gun at SP15 and demanded the door to be opened. SP15 did as demanded and the appellant left the shop with the gun still in his hand. As soon as he stepped out of the shop. SP1 and SP15 saw the appellant firing his gun in the direction of the adjoining shops. They heard several rounds of gunfire. It so happened that at the very moment the appellant was about to step out of the shop, two patrolling police personnel. SP9 and SP12, were alerted to the robbery and they saw the appellant in the shop with a gun in his hand. The appellant must have seen the two constables too, for as he stepped out of the complainant's shop, he opened fire in the direction of the two constables. The Constables returned fire and took cover behind a large flower pot standing in front of the complainant's shop. A further exchange of fire ensued between the appellant and the constables. The appellant managed to get on his motorcycle and sped off with the constables discharging gunshots in his direction.

The learned judge made a specific finding of fact that SP1 and SP15 had ample opportunity to observe the robber who was barely a foot or so from them. The two Constables were equally specific in their identification of the appellant as the robber who shot at them. The learned judge came to the conclusion that the appellant was "indelibly and positively identified by the complainant SP15, SP9 and SP12 in manner assertive and unfaltering."

The learned judge also made a finding of fact that apart from the indelible identification in court, there were other evidence that pointed irresistibly to the appellant as the robber. SP9 in his evidence testified that when he opened fire at the fleeing robber "Saya rasa dia kena tembak." The appellant who was arrested one month later had two healed gunshot wounds, one in the elbow region of the left arm and the other in his right buttocks, with the entry point in each case from the rear. Further when the appellant was arrested, a gold bracelet recovered from him was positively identified as one of the articles stolen from the shop in question. Several other gold items recovered were also positively identified by SP1.

In the light of the overwhelming evidence, we satisfied that the learned judge came to the right conclusion as to the identity of the armed robber as being the appellant We are also satisfied that apart from the court identification of the appellant as being the armed robber, there are other overwhelming evidence which positively put the appellant at the scene of the robbery at Tai Loong Diamond and Jewellery shop on the day in question. It does not follow, as a matter of course, that just because the learned judge rejected the identification at the identification parade, he must of necessity also reject the dock identification of the appellant. He rejected it not because there was no identification of the appellant as the robber, but because there were defects in the conduct of the parade (the appellant was in fact identified). In the light of this we find that his rejection of the evidence of the identification at the identification parade was in no way fatal to the dock identification of the appellant as the robber. The learned judge had ample evidence before him to come to the conclusion as he did on the identity of the robber as being the appellant.

Generally speaking an identification at an identification parade, held usually a short time after the incident, would tend to strengthen the prosecution's case but it does not follow that the lack of it would be fatal, or would destroy a court or dock identification. It must necessarily depend on the facts and circumstances of each particular case. Unlike in the case of *Arumugam s/o Muthusamy v. Pendakwa Raya* [1998] 3 AMR 2293 where the court relied solely on the dock identification, in the present case there are other cogent evidence to put the appellant at the scene of the robbery. The court's

identification was merely to confirm this. On the facts and circumstances of this case, the court or dock identification of the appellant was rightly accepted.

It is rather strange that having strenuously challenged the issue of identification, the appellant in his defence unreservedly admitted to being the robber in question. His defence was that it was not the case of him not being the robber in question, but that he was only armed with a toy or imitation gun. Firstly, it is significant that the issue of an imitation gun was only raised in his defence. During the course of the case for the prosecution not one hint was dropped that the so called gun was in fact a toy or imitation gun. It is trite law that it is incumbent for the defence case to be put at the earliest possible stage and not sprung as a surprise for the first time when the defence is putting forward its case. (See *PP v. Lin Lian Chen* [1992] 2 MLJ 561). The learned judge rejected this defence on the ground that it has not raised any doubt on the prosecution's case, as the unrebutted evidence showed that the gun in the appellant's hand was in fact a genuine gun.

According to the two Constables, the appellant on stepping out of the shop opened fire at them and they in turn retaliated. They even had to take refuge behind a big flower pot. There would have been no reason for the two Constables to open fire at the appellant if he did not open fire at them first and no reason for them to take refuge as they did if the appellant had only a toy gun. In the light of the evidence before the court, we are of the view that the learned judge rightly rejected the defence of the imitation gun.

In view of the overwhelming evidence before the court, we found no reason to disturb the findings of the learned judge. We dismissed the appeal and confirmed both the convictions and the sentences.